IN THE

Supreme Court of the United States

OCTOBER TERM 1950.

No. 297.

KIEFER-STEWART COMPANY, *Petitioner*,

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE JURY FINDING OF CONSPIRACY AMONG THE RESPONDENTS.

a. Respondents have advanced erroneous standards for testing the jury verdict.

Respondents' attempt to demonstrate (Respondents' Brief, pp. 14-20) that there is no evidence to support the jury's finding of a conspiracy between respondents to fix and coerce resale prices, shares two of the vices inherent in the holding of the Court of Appeals and adds a third fallacy. Both the court below and respondents treat the

evidence as though its sum total amounted only to proof of parallel action, both ignoring the fact that the strong circumstantial evidence of combination was conclusively sealed by the admission of two top Calvert officials that Calvert "*had* to go along with Seagram * * * on *their* sales policy" (R. 40). Further, both the court below and respondents are guilty of testing the proof of the ultimate question of fact, i. e. conspiracy, by dealing with each of the various elements of proof as a separate isolated fact and ignoring the overall probative weight of the evidence considered in its entirety. (See Petitioner's Brief, pp. 19-21, 22-23.) The correct standard has been elsewhere well stated by the court below in *United States* v. *New York A. & P. Tea Co.*, 173 F. 2d 79, 81 (7 Cir., 1949):

> "In this consideration, we look only to the evidence which is favorable to the court's finding and such reasonable inferences as may be drawn from the facts proved. *Furthermore, we consider the case here as a whole and not piecemeal. If viewing the evidence as a whole there emerges an overall pattern of guilt as charged, the finding must be sustained.*" (Emphasis supplied.)

Respondents now seek to compound their errors by refusing to recognize that it was the jury's right to disbelieve the testimony of respondents' witnesses and by ignoring what the brief of the Solicitor-General, *amicus curiae*, refers to (p. 12) as "the function of the jury to weigh the credibility of the defendants' testimony against the permissible inferences to be drawn from their conduct." Illustrative is respondents' contention that Calvert, prior to November 6, 1946, had, independently of Seagram, determined upon a sales policy involving control of the resale prices of petitioner and other Indiana wholesalers through the suspension of shipments (Respondents' Brief, p. 14). This contention is contrary even to the conclusion arrived at by the court below, which was that "up to November 19,

1946, Calvert was pursuing its own independent course, which was directly opposite to that which had been announced by Seagram." (R. 405) Respondents' contention to the contrary in effect is based upon these premises: (i) That only the testimony of Wachtel on direct examination and not Calvert's conduct in Indiana nor the statements of its three high officials, Gollin, Reznik and Schwalb, can be considered in determining what Calvert's policy was between November 6 and November 19, 1946; (ii) that Calvert decided to suspend shipments prior to November 6, 1946; and (iii) That no inference that Calvert's action in cancelling its commitments to petitioner was the result of agreement with Seagram, could be drawn from the statements of Reznik and Schwalb that Calvert "*had* to go along with Seagram * * * on *their* sales policy".

The mere fact that Wachtel may have claimed from the witness stand, in an attempt to legalize Calvert's conduct, that he had decided to cut off his Indiana customers before November 6th, did not require the jury to accept that explanation—which was in the teeth of the proof that Gollin, Schwalb and Reznik had indicated until November 19th that, "regardless of what Seagrams did", Calvert was going through with the Kiefer-Stewart deal, and, on November 19th, that Calvert had recanted because it had to go along with Seagram on the latter's sales policy.

Secondly, the claim that Calvert decided to suspend shipments prior to November 6th is contradicted by the testimony of Reznik, who claimed to have participated with Wachtel in making that decision (R. 241). Reznik testified that on November 19th he told Moxley "we are going to stop shipping everybody" (R. 241), that he instructed Schwalb on that day to notify every wholesaler in Indiana, including Kiefer-Stewart, that their distributorships were discontinued (R. 239-243), and that "*this policy was decided a day or two before then* because *we* had made up our minds in New York and I came on to Chicago" (R. 245). Moreover, Reznik's version of the date of the deci-

sion is the only one consistent with Calvert's action in executing a new list of distributors, including Kiefer-Stewart, on November 13, 1946 and filing the same with the Indiana Alcoholic Beverage Commission on November 16, 1946. (Plaintiff's Exhibit No. 10, R. 78, 297-298).

The attempted explanation of Calvert's negotiations with petitioner after November 6th, based on Schwalb's claim that petitioner had requested deferment of its shipments (R. 223), was denied by Baker (R. 111), and the evidence clearly showed that the Calvert merchandise was promised for delivery at the time of the big meeting planned in Indianapolis for November 23rd (R. 82, 109).

And, finally, Calvert's explanation of the reason for its abrupt about-face was more than a description "of the action being taken" (Respondent's Brief, p. 18); it was both an explanation and a candid apology.

Upon the question of fact thus presented to the jury, the language of this Court in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, is particularly appropriate:

> "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

b. Corporate affiliation bestows no immunity.

Apparently cognizant of their inability successfully to assail the finding by the jury of a combination and conspiracy, the respondents in their answer brief have urged a new defense, not presented in the court below, in the form of a claimed immunity from the operation of the Sherman Act.

This defense, obviously urged by way of afterthought, appears to be that, irrespective of the fact that the evidence establishes a combination which, among independent traders, would be a violation of the Sherman Act, the status of respondents "as mere instrumentalities of a single manufacturing-merchandising unit precludes the possibility of any 'conspiracy' condemned by the Sherman Act" (Respondents' Brief, p. 20). This unique, eleventh-hour defense seeks to convince this Court that in spite of a judgment and verdict in the District Court there was a price-fixing conspiracy and even if, as a matter of law, such a conspiracy violates the Sherman Act, nevertheless these respondents (who, in fact, hold themselves out to the public as independent traders) are not answerable merely because they are closely connected by corporate interrelationships.

In *Schenley Distillers Corp.* v. *U. S.*, 326 U. S. 432, Schenley claimed that a wholly-owned trucking company, whose operations were to be performed solely for its parent, was on that account a private rather than a contract carrier. This Court, rejecting that contention, stated the broad governing principle in the following language (at p. 437):

> "While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.
>
> "The fact that several corporations are used in carrying on one business does not relieve them of their

several statutory obligations more than it relieves them of the taxes severally laid upon them."[1]

U. S. v. *Yellow Cab*, 332 U. S. 218, involves an application of this principle to interrelated corporations under common ownership, charged with having violated the anti-trust laws. This Court said with respect to the asserted immunity of companies under common ownership that (p. 227):

> "The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."

United States v. *Columbia Steel*, 334 U. S. 495, on which respondents rely, gives no support to their contention that affiliated companies are accorded favored treatment under the Sherman Act. There the Government argued that the intent and tendency of the purchase of Consolidated Steel by United States Steel was to effect an exclusive dealing arrangement between them. Having failed to prove that the exclusive dealing arrangement inherent in the acquisition unreasonably restrained trade, the Government nevertheless contended that any exclusive dealing arrangement was illegal *per se* if accomplished by integration, relying on *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218. This Court quite properly pointed out that the *Yellow Cab* case stood for no such principle saying (pp. 521-22):

> "We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other com-

[1] See also decisions of this Court under the "Commodity Clause". *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Delaware, Lackawanna & Western R.*, 238 U. S. 516; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492.

petitor producers to market their rolled steel. In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act."

These respondents are in no position to claim an immunity not available to them if "viewed as independent traders", when they have deliberately asserted their independence both here and before the public. At the trial, James E. Friel, vice president and treasurer of all respondents, testified with respect to all four respondents as follows: (R. 152)

"Q. Each one is a separate corporation? A. That is correct.

Q. Had its own officers? A. Yes, sir.

Q. Kept its own books? A. Yes, sir.

Q. Dealt with the public separately? A. Yes, sir.

Q. Made separate contracts with the public? A. Yes, sir.

Q. Did the Seagram Distillers ever hold itself out to the public as having any connection with the Calvert Sales Company? A. No, sir.

Q. And the same is true, Calvert never held itself out as having any connection with Seagram? A. That is correct.

The Court: They were really competitors?

The Witness: Really competitors."

Other evidence in the record shows that respondents were meticulous in maintaining their separate entities and all appearances of competition before the public (R. 382, 392).

The argument of the respondents, to the extent that it is applicable to this case, reduces itself to this: That separate corporations may through separate dealings with the public, as independent traders, reap all of the advantages of that arrangement and still, with impunity under the Sherman Act, conspire to fix resale prices and to coerce and boycott wholesalers, because their independence was only a sham or device to exploit the sale of their products to the public.

II. THE CONSPIRACY ALLEGED AND FOUND IS ILLEGAL.

Respondents contend that the legality of their combination and conspiracy with respect to resale prices should be considered without regard to the evidence adduced (Petitioner's Brief, pp. 32-34) to show that respondents fixed absolute resale prices. This contention is based on the alleged absence of any allegation in the complaint to that effect. The complaint charged that (R. 14, par. 28):

> "Seagram * * * subsequent to November 12, 1946 * * * induced defendants Calvert and Calvert (Sales) to enter into an agreement, contract, combination and conspiracy unlawfully to agree upon and fix the resale prices of said defendants' respective whiskies sold to wholesalers in Indiana and unlawfully to cut off and cease all shipments of their respective whiskies * * * to such of the Indiana wholesalers as did not agree to abide by the resale prices so fixed and agreed upon by the said defendants."

Respondents contend that a conspiracy to fix maximum resale prices is not illegal under the Sherman Act and, further, that such a conspiracy is actually protected by the terms of that statute.

That contention is based on this Court's decision in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. That case obviously does not limit in any way the doctrine that all price-fixing by business groups is illegal *per se*, as announced in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. The Court pointed out in the *Apex* case that the restraint by the employees in that case had no actual or intended effect on price or price competition (p. 504) and that labor strikes had historically been held illegal only when they are intended to have, or in fact have, effects on the market process. The *Socony-Vacuum* principle is directly based on the deleterious effect on the market of price-fixing agreements, and their actual or potential threat to the central nervous system of the economy makes them illegal *per se*.

III. THE COURT SHOULD DISPOSE OF THE OTHER ASSIGNMENTS OF ERROR AND REINSTATE THE JUDGMENT OF THE DISTRICT COURT.

Petitioner's principal brief fully presented and argued the other assignments of error not formally decided by the Court of Appeals. Respondents also have fully briefed their position on such assignments and have urged this Court to consider them if this Court reverses the Court of Appeals. This Court has disposed of questions not decided by an appellate court and reinstated the judgment of a District Court in an antitrust action, *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

The principal assignment of error argued in the court below was in effect decided against petitioner by a dictum in the opinion. (R. 407) Respondents contended that they could try before the jury as a defense the question whether petitioner and other wholesalers, not parties here, had conspired among themselves to fix prices. The trial court instructed that such a separate and independent conspiracy could not be a defense or an issue in this case. (R. 264) The Court of Appeals said in effect that the existence of such a conspiracy among purchasers of whiskey could be a legitimate excuse for the combined action of the respondents shown by the record in this case. (R. 407)

This is a doctrine without support either in logic or authority. If this issue is not decided by this Court, the case will be remanded for new trial by the court below on an er-

roneous theory. It is therefore an important issue now before this Court which should be decided.

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